

FEDERAL MARITIME COMMISSION

DOCKET NO. 14-16

BALTIC AUTO SHIPPING, INC.

v.

**MICHAEL HITRINOV a/k/a MICHAEL KHITRINOV,
EMPIRE UNITED LINES CO., INC.**

ORDER DENYING REQUEST FOR STAY

On January 22, 2015, respondents Michael Hitrinov a/k/a Michael Khitrinov and Empire United Lines Co., Inc. (Empire) filed "Respondents' Emergent Request for Stay of Proceeding."¹ The request includes a copy of a civil complaint that Empire filed against complainant Baltic Auto Shipping, Inc. (Baltic) in the United States District Court for the District of New Jersey. *Empire United Lines Co., Inc. and Michael Hitrinov v. Baltic Auto Shipping, Inc.*, No. 2:15-cv-00355-CCC-MF (D.N.J. Jan. 20, 2015) (complaint filed). In that complaint, the second of two relevant district court cases between the parties, Empire alleges that when Baltic filed the Complaint in this proceeding before the Commission, it violated a settlement agreement between the parties resolving a 2011 New Jersey district court case, the first district court case. *See id.*, Complaint ¶ 9, referring to *Baltic Auto Shipping, Inc. v. Michael Hitrinov a/k/a Michael Khitrinov, Empire United Lines Co., Inc., et al.*, No. 2:11-cv-06908-FSH (D.N.J. Dec. 7, 2011) (Stipulation and Dismissal).

¹ Empire first made this request by email addressed to the Secretary. After consultation with the Office of the Secretary, Empire resubmitted a substantially identical request in a PDF attachment to an email. The body of the attachment was also addressed to the Secretary. Baltic filed an opposition to the request for stay in the form of a letter to the Secretary, and Empire filed a reply in the form of a letter. The parties should note that the presiding officer has the authority to grant or deny a stay, not the Secretary. 46 C.F.R. § 502.25. Any future "requests" regarding this proceeding should be made by motion filed with the Secretary. 46 C.F.R. §§ 502.2; 502.25; 502.69-502.71.

Empire states:

Respondents herein respectfully request a stay of the proceeding now pending before the Federal Maritime Commission until the federal District Court for New Jersey determines whether the instant matter is simply the reiteration of an old, settled matter that had been dismissed with prejudice. It would be in the interest of judicial economy to grant such relief.

(Respondents' Emergent Request for Stay of Proceeding.)

On January 27, 2015, Baltic filed an opposition to the request. The opposition includes an Opinion and Order entered by Judge Cecchi in the 2015 district court case denying Empire's request for temporary restraint and an order to show cause. *Empire United Lines Co., Inc. and Michael Hitrinov v. Baltic Auto Shipping, Inc.*, No. 2:15-cv-00355-CCC (D.N.J. Jan. 23, 2015) (Opinion and Order). Judge Cecchi's order refers to an order dated January 16, 2015, issued by Judge Hochberg in the 2011 case. *Id.* at 4. On January 29, 2015, I issued an Order requiring Baltic to file a copy of Judge Hochberg's order. *Baltic Auto Shipping, Inc. v. Michael Hitrinov a/k/a Michael Khitrinov and Empire United Lines Co., Inc.*, FMC No. 14-16 (ALJ Jan. 29, 2015) (Order to File District Court Opinion and Order). Empire filed Judge Hochberg's order on the same day.

In the 2015 order in the 2011 case, Judge Hochberg stated:

[T]he Court's 2011 Order did not retain jurisdiction indefinitely. Rather, it retained jurisdiction only if the settlement was not consummated. The Court is without jurisdiction to enforce a breach of a settlement agreement consummated over three years ago. Moreover, it appears the original matter was settled before proper service of the Complaint and filing of proof of service, and thus before this Court had acquired jurisdiction. Accordingly, this matter remains closed.

Defendants may file a new action and deliver an application for an order to show cause with temporary restraints to the Clerk in accordance with L. Civ. R. 65.1.

Baltic Auto Shipping, Inc. v. Michael Hitrinov a/k/a Michael Khitrinov, Empire United Lines Co., Inc., et al., No. 2:11-cv-06908-FSH (D.N.J. Jan. 16, 2015) (Order).

In the order in the 2015 case, Judge Cecchi stated:

Plaintiffs [Empire and Hitrinov] do not contest that they may raise their claims that [Baltic] has breached the settlement agreement before the FMC. Pls. Reply 4-5 ("It is precisely *because* plaintiffs may move to dismiss the FMC matter on the same grounds which plaintiffs are relying upon to support their cause of action in this case for breach of the settlement agreement, that plaintiffs are exposed to the risk of multiple and inconsistent decision."). Plaintiffs' request for injunctive relief thus

boils down to their preference for this Court as a forum in lieu of the FMC. *Id.* at 5 (“When the parties settled the 2011 Baltic Lawsuit, they specifically negotiated for and contracted for this Court to retain jurisdiction over enforcement of the settlement agreement”). However, Judge Hochberg’s order dated January 16, 2015, denying Plaintiffs’ application for injunctive relief filed in the earlier case that was settled, indicated that this Court did *not* retain jurisdiction over the matter to enforce the settlement agreement. *See* [Judge Hochberg’s 2015 Order]. The specter of any remaining issues concerning concurrent litigation does not justify injunctive relief at this time. Plaintiffs have failed to satisfy their burden as to irreparable harm.

Empire United Lines Co., Inc. and Michael Hitrinov v. Baltic Auto Shipping, Inc., No. 2:15-cv-00355-CCC, Order at 3-4 (D.N.J. Jan. 23, 2015) (Opinion and Order) (emphasis in Opinion and Order).

On January 30, 2015, Empire filed a reply. A motion for stay is a non-dispositive motion. 46 C.F.R. § 502.69(g). The party filing a non-dispositive motion may only file a reply to an opposition to the motion “unless requested by the Commission or presiding officer, or upon a showing of extraordinary circumstances.” 46 C.F.R. § 502.71(c). Empire contends that extraordinary circumstances exist because of Baltic’s argument “that the decision of the District Court of New Jersey not to grant injunctive relief to [Empire] renders [Empire’s] request for a stay of the instant Proceeding moot.” (Respondents’ Reply at 1.) I note that the district court order was entered after Empire filed its request for stay; therefore, Empire was not able to address the order in its request. In these circumstances, I find that Empire has demonstrated extraordinary circumstances and permit filing of the reply. In the reply, Empire contends that the Commission should stay this proceeding because the 2015 district court case is a continuation of the 2011 district court case and the 2011 district court case was the first case between the parties on this matter, so judicial economy requires staying the Commission case.

In an earlier order in this proceeding, I stated:

The appropriate test for the Commission’s jurisdiction is whether a complainant’s allegations “involve elements peculiar to the Shipping Act.” *Cargo One, Inc. v. COSCO Container Lines Company, Ltd.*, 28 S.R.R. 1635, 1645 (FMC 2000). Baltic alleges that Empire, a non-vessel-operating common carrier licensed by the Commission, violated the Shipping Act on transportation of cargo by water between ports in the United States and ports in a foreign country. To expedite this proceeding, I affirmatively find that the Commission has subject matter jurisdiction over this proceeding.

Baltic Auto Shipping, Inc. v. Michael Hitrinov a/k/a Michael Khitrinov and Empire United Lines Co., Inc., FMC No. 14-16, Order at 6 (ALJ Dec. 22, 2014) (Order on Respondents’ Motion for a More Definite Statement). To elaborate, section 8(c) of the Shipping Act, now codified at 46 U.S.C. § 40502(f), provides: “Unless the parties agree otherwise, the exclusive remedy for a breach of a

service contract is an action in an appropriate court.” In *Cargo One*, the question was whether this provision precluded Commission jurisdiction over complaints alleging Shipping Act violations related to service contracts.

While section 8(c) reasonably precludes the Commission from adjudicating breach of contract claims, the courts more properly equipped to address those matters are not authorized to address Shipping Act matters exclusively within the Commission’s jurisdiction. Such issues are not addressed in actions for breach of contract and no remedy for such violations would be provided in a breach of contract action. Moreover, as noted *supra*, reliance on the Commission to pursue such violations *sua sponte* in its investigatory role would eviscerate the reparations remedy afforded complainants by the statute. Therefore, we find that the ALJ should proceed to consider those claims.

Cargo One, 28 S.R.R. at 1645.

Relying on the principles stated in *Cargo One*, the Commission has held that jurisdiction over a complaint alleging violations of the Shipping Act exists even though a proceeding in another forum may have resolved some issues between the parties. For instance, prior to filing its complaint with the Commission, one complainant had sought and obtained an arbitration award of several hundred thousand dollars against the Commission respondent. The complainant filed a complaint with the Commission alleging Shipping Act violations and seeking another million dollars. The Commission reversed the order of the administrative law judge dismissing the complaint and remanded for further proceedings on the Shipping Act claims set forth in the complaint. The Commission held that the fact that the service contract between the parties required arbitration:

does not outweigh the Commission’s duty to protect the public by ensuring that service contracts are implemented in accordance with the Shipping Act. . . . To preclude Anchor from proceeding with its complaint solely because a private arbitrator previously issued a ruling would be inconsistent with our statutory mandate to hear such complaints.

Anchor Shipping Co. v. Aliança Navegação E Logística Ltda., 30 S.R.R. 991, 998 (FMC 2006). The Commission stated that “[o]n remand, we direct the ALJ to address only those allegations involving Shipping Act violations, and any disputes previously addressed by the Arbitrator that are based upon common law breach of contract claims shall remain binding upon the parties.” *Id.*, at 999-1000.

The 2011 district court case between Baltic and Empire seems to have ended with Judge Hochberg’s January 16, 2015, Order. Baltic’s 2015 complaint seeks “specific performance of the [2011] settlement agreement, including a preliminary injunction and temporary restraining order against [Baltic] continuing to proceed with its claims before the . . . Commission.” *Empire United Lines Co., Inc. and Michael Hitrinov v. Baltic Auto Shipping, Inc.*, No. 2:15-cv-00355-CCC-MF,

Complaint at 7 (D.N.J. Jan. 20, 2015) (filed). Judge Cecchi denied temporary relief, but did not dismiss the complaint; therefore, it appears that the complaint for specific performance is still active.

The Commission should not delay its proceeding pending a decision in the 2015 district court case, however. Whatever the outcome of the New Jersey cases, “[t]he Commission has exclusive jurisdiction to administer and enforce the 1984 Act. Violations of the 1984 Act can be rectified only by the sanctions and remedies provided for in that Act.” *Unpaid Freight Charges*, 26 S.R.R. 735, 739 (FMC 1993) (preamble to final interpretive rule now codified at 46 C.F.R. § 545.2). The Amended Complaint in this proceeding alleges that Empire violated sections 41104(2)(a), 41104(4)(a), and 41104(8) of the Act by charging Baltic rates greater than those it charged other shippers and by charging Baltic rates greater than those reflected in its published tariff; section 40501(a) by failing to keep tariffs open to public inspection; and section 41102(c) by failing to provide Baltic with shipping documents. (Amended Complaint at 5.) These allegations are within the jurisdiction of the Commission. Therefore, Empire’s request to stay this proceeding pending the conclusion of the New Jersey district court cases is denied.

The Initial Order requires the parties to “submit a joint status report with proposed schedule . . . within twenty days of the service of the answer.” *Baltic Auto Shipping, Inc. v. Michael Hitrinov a/k/a Michael Khitrinov and Empire United Lines Co., Inc.*, FMC No. 14-16, Order at 6 (ALJ Dec. 5, 2014) (Initial Order). In the circumstances of this proceeding, I find that it would be beneficial for the parties to have a telephone conference with the undersigned prior to filing the schedule. Therefore, the parties are ordered to determine a time on Wednesday, February 4, 2015, or Thursday, February 5, 2015, when they will be available for the conference and notify the undersigned of the time by email addressed to judges@fmc.gov.

ORDER

Upon consideration of Respondents’ Emergent Request for Stay of Proceeding and construing the request as a motion, the opposition thereto, and the record herein, and for the reasons stated above, it is hereby

ORDERED that Respondents’ motion be **DENIED**. It is

FURTHER ORDERED that the parties notify the undersigned forthwith of the date and time they are available for a telephone conference.


Clay G. Guthridge
Administrative Law Judge